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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App.* pp. A2-A18) is reported at 511 F. 2d 199 (1975). The opinion of the District Court for the Western District of Pennsylvania (Pet. App. pp. A19-A48) is reported at 372 F. Supp. 1146 (1974) and its memorandum order (Pet. App. pp. A49-A51), denying the motion for reconsideration filed by Petitioner Liberty Mutual Insurance Company (hereafter "Liberty" or the "Company"), is reported at 372 F. Supp. 1163 (1974).

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* The joint appendix is herein referred to as "App." The appendix to the petition for a writ of certiorari, containing the opinions of the lower courts, is referred to as "Pet. App."

JURISDICTION

The judgment of the Court of Appeals (Pet. App. p. A1), affirming the judgment of the District Court, was entered on February 11, 1975. A timely petition for writ of certiorari was thereafter filed on April 2, 1975, and granted on May 27, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-2(a)(1) (hereafter "the Act"), in pertinent part provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .

QUESTION PRESENTED

Whether a disability income protection plan which excludes disabilities due to pregnancy in addition to other disabilities, while providing for equal risk coverage, benefits and contributions on behalf of all employees, constitutes prohibited sex discrimination under the Act.

STATEMENT OF THE CASE

Liberty is a casualty insurance company which maintains offices throughout the country. The Company provides for its employees[1] a contributory[2] group disability income protection

1. A description of the plan's present provisions, as set forth in the current employee group benefit plans handbook, has been attached hereto as Appendix A. Prior descriptions of the plan are contained at App. pp. 90-100.

2. Each employee pays thirty-three (33) cents for each one hundred dollars ($100) of salary, or approximately one-third of one percent of his or her income. This employee contribution is approximately "one-third of the cost" of the policy; the Company "pays the balance." App. p. 99; and Appendix A p. A4.

plan. The plan provides benefits to an employee[3] who is absent from work for eight calendar days due to a covered illness or accident which requires the treatment of a physician. The benefits consist of two-thirds of the employee's salary to a maximum of $150.00 per week for 103 weeks if the employee has less than five years service, or to a maximum of $270.00 per week for a period up to age 65 for an employee with over five years service.[4]

There are significant limitations, however, on payment of the benefits: the various definitional restrictions as to who is an employee, the initial waiting period and the maximum amount and period of payment as indicated above; the requirement that during the first year of disability the employee must be unable to perform all of the duties of his or her occupation, and thereafter be unable to perform the duties of any occupation; the provision that any other remuneration or other statutory or plan benefit that may be received by the employee reduces the benefit provided under the Liberty plan; the modification of the plan in those States with statutory disability benefit laws[5] to meet

3. To qualify, an employee must be a full time employee who has continuously worked for Liberty for at least three months. App. pp. 89 and 98; and Appendix A p. A3.

4. The Company also provides a supplementary salary benefit plan which, in covered cases, pays one-half the difference between the employee's full salary and plan benefits for a number of weeks equal to the number of years the employee has worked for the Company. Appendix A pp. A3-A4.

5. California (Cal. Unemp. Ins. Code § 2601, *et seq.*); Hawaii (Hawaii Temporary Disability Insurance Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392); New Jersey (Temporary Disability Benefits Law, N. J. Stat. Ann. § 42:21-25); Rhode Island (Rhode Island Temporary Disability Insurance Act, General Laws R. I., § 28-39-1); and New York (Workmen's Compensation Law, Art. IX, §§ 200-242). In these states, coverage commences on the first day of employment at the statutory benefit level. After the employee becomes eligible for the Liberty plan (see n. 3, *supra*), the plan picks up the difference between statutory and plan coverage. Appendix A p. A4; App. p. 100.

statutory requirements; the limitation that the disability must be the result of "accidental bodily injury or sickness" which excludes a variety of disabilities such as elective surgery like a hair transplant; and the plan's specified exclusions. The exclusions deny benefits for any period of disability caused by any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, any disability which "does not require through its continuance the regular attendance" of a licensed physician, and "any portion of a period of disability due to mental or emotional disorder, alcoholism, or drug addiction unless the employee is engaged in a corrective program under the guidance of a licensed physician." In addition, the plan also provides that benefits are not payable "for disability due to pregnancy or any cause related to pregnancy." See Appendix A p. 3, and App. pp. 88, 99.

In 1972, at a time when the Equal Employment Opportunity Commission's (hereafter "E. E. O. C.") then-applicable guidelines permitted the exclusion of pregnancy related disabilities from an employee disability benefit plan (see nn. 20, 21, *infra*), Wetzel and Ross, two Liberty technical claims department employees in Pittsburgh, Pennsylvania, filed charges with the Commission accusing the Company of engaging in sex discrimination proscribed by the Act. Upon subsequent issuance of a right to sue letter, they commenced an action in the District Court, alleging, insofar as is relevant here,[6] that Liberty discriminated against all of its female employees by excluding the risk of pregnancy from the coverage of the income protection plan. On January 9, 1974, that Court granted Wetzel and Ross' motion for partial summary judgment on the issue of liability and issued

6. The litigation below involved a number of liability issues not now before this Court. Some have already been separately resolved, while others are still pending before the District Court. With the exception of a return from leave policy not at issue in this case, and the policy here in question, the District Court expressly found that all other matters in contention had been discontinued for some time so that no injunctive relief was necessary. Pet. App. pp. A44, A47-A48.

an interlocutory order finding, *inter alia*, that Liberty violated the Act by excluding pregnancy from benefit coverage. The District Court thereafter denied Liberty's motion for reconsideration, but did certify its findings as a final order enabling Liberty to appeal to the Third Circuit. Pet. App. pp. A50-51.

On February 11, 1975, the Third Circuit affirmed. It held, first, that this Court's decision in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), was "not dispositive" because that case involved an Equal Protection Clause claim rather than an action arising under the Act; *second*, that the E. E. O. C.'s current guideline (29 C. F. R. § 1604.10), which states that pregnancy benefits should be applied on the same basis as "other temporary disabilities", were entitled to "deference"; *third*, that because Liberty's plan "covers so many disabilities but excludes pregnancy . . . [it] cannot stand"; and, *finally*, that although the plan "is neutral on its face . . . [it] treats a protected class in a disparate manner . . . [contrary to] *Griggs* v. *Duke Power Co.*, 401 U. S. 424." Pet. App. p. A14. Because it believes that these conclusions are without merit, Liberty has filed the instant petition.

SUMMARY OF ARGUMENT

I. This Court recognized in *Aiello* that the exclusion of "one physical condition—pregnancy—from the list of compensable disabilities" covered by a disability insurance policy "does not exclude anyone from benefit eligibility because of gender." 417 U. S. at 496-497, n. 20. Every physical condition involves a subgroup of employees that consists of varying percentages of employees of either sex. Absent, therefore, a showing of a pretext "designed to effect an invidious discrimination against the members of one sex or another" (*ibid.*), the exclusion of a particular risk is not discriminatory. An examination of the legislative history of Title VII, other related Congressional statements and the relevant background of administrative regulation further substantiates the non-discriminatory nature of a

pregnancy exclusion in a policy which provides, as here, for equivalent risk coverage, benefits and contributions for all employees.

II. Respondents did not show that Liberty's pregnancy exclusion was a pretext designed to effect an invidious discrimination against females. Rather, the exclusion is based on considerable legitimate criteria. The cost of providing pregnancy benefits is disproportionately immense and, as a result, the exclusion of pregnancy, as well as other high cost risks, from a disability income plan is commonplace. There are also significant dissimilarities in the nature, severity, duration and frequency of non-return to work of pregnancy when contrasted with other illnesses or injuries. Other plan exclusions, moreover, are also concentrated in particular sex, race and religious groups. These distinctions negate any assertion that the plan's pregnancy exclusion was motivated by a pretextual discriminatory intent.

III. Here, in contrast to *Griggs,* there are neither barriers to employment opportunity nor treatment of a protected class in a disparate manner. Female Liberty employees do not receive less benefits or aggregate risk coverage under the income protection plan than do their male counterparts. In fact, under plans such as Liberty's, females receive a disproportionately high percentage of benefits in addition to protection against many uniquely feminine conditions. *Griggs,* accordingly, is inapposite; that decision does not proscribe an employment policy "simply because of variances in the [sexual] composition of the different . . . programs." *Jefferson* v. *Hackney,* 406 U. S. 535, 549, n. 19 (1972).

IV. The Court of Appeals erred in giving deference to the EEOC's present guidelines. These guidelines do not represent a contemporaneous administrative interpretation that is consistent with the congressional intent. To the contrary, the current guidelines, completely reversing the EEOC's prior well-established position, were adopted without either thorough consideration or any factual basis. Here, as in *Espinoza* v. *Farah Manufacturing Company,* 414 U. S. 86, 94-95 (1973), deference is not required because ". . . there are 'compelling indications [that the guidelines are] . . . wrong.' "

ARGUMENT

I. The Exclusion of Pregnancy Benefits from Liberty's Disability Income Plan Does Not Constitute Discrimination Based on Gender under Title VII.

The threshold question in evaluating any claim of unlawful sex discrimination, whether it be under the equal protection clause or under the Act, is to ascertain whether there is unlawful discrimination based upon gender as such.[7] In this case, as in *Aiello,* that inquiry leads inexorably to the conclusion that the exclusion of pregnancy from the totality of risks insured is not, in and of itself, as shown in Part A below, an improper sex-based classification. Moreover, it would be anomalous, as discussed in Part B below, to adopt a different test of discrimination under the Act than that utilized under the equal protection clause in *Aiello.* Finally, as shown in Part C below, an analysis of the relevant statements of congressional intent, as well as the background of administrative practices, further demonstrates that the neutral implementation of an insurance plan which is

7. In the words of Judge Widener of the Court of Appeals for the Fourth Circuit:

> The inquiry in this case must therefore focus initially on whether the exclusion of pregnancy related disability from the disability benefits plan is sex discrimination. If it is not sex discrimination, then, regardless of what test is applied there is no Title VII violation. . . . Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause would not render unlawful a pregnancy exclusion such as that involved here.

Gilbert v. *General Electric Company,* ..... F. 2d ....., 126 Daily Lab. Rep. D-1, D-4 (June 30, 1975) (4th Cir. June 27, 1975), *pets. for cert. pend.,* Nos. 74-1589 and 74-1590 (dissenting opinion). See also Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination,* 75 Col. L. Rev. 441, 466-468 (1975).

based on equal aggregate risk coverage and equal contributions for all employees does not constitute sex discrimination within the meaning of Title VII.

A. Here, as in *Aiello,* the Liberty plan does not differentiate on the basis of sex ". . . in terms of the aggregate risk protection. . . ." There is, as this Court stated (417 U. S. at 496-497):

> . . . no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.

Each employee, whether he or she is a pregnant female or a non-pregnant person, benefits equally, *i.e.,* is protected from the same risks. A reallocation of the insurance dollars available to include coverage for pregnancy disabilities would thus not only reduce the protection for males, but would reduce it for *all females,* perhaps to an inadequate level. By the same token the costs paid by all employees and for all employees by the Company is the same, in terms of the percentage of the employee's salary, without regard to gender. Accordingly, no basis exists for any claim that there is a lack of equality in treatment; the challenge is, as it was in *Aiello,* to the "underinclusiveness of the set of risks" for which protection is offered. 417 U. S. at 494. That is, however, not a request for equality which is all that Title VII guarantees, but instead a request to recognize, as one court stated in striking down a pregnancy exclusion, "women's biologically more burdensome place in the scheme of human existence."[8] Such reform is a political and social question for the legislature rather than for the courts under the Act.

The Court of Appeals found *Aiello* "not dispositive" because that case arose in a constitutional, rather than a statutory, context. Pet. App. p. A8. This difference, however, even assuming that Title VII has a reach "broader than the equal protection

8. *Gilbert* v. *General Electric Co.,* 375 F. Supp. 367, 383 (E. D. Va. 1974), *aff'd,* ..... F. 2d ....., 143 Daily Lab. Rep. F-1 (July 24, 1975) (4th Cir. June 27, 1975), *pets. for cert. pend.,* Nos. 74-1589 and 74-1590.

clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a 'lack of identity between the excluded disability and gender as such', the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause." *Gilbert* v. *General Electric Co., supra* (dissenting opinion). Here, in contrast to *Phillips* v. *Martin Marietta Corp.,* 400 U. S. 542, 544 (1971), and other cases,[9] this Court is not confronted with an exclusion of employment opportunities for "persons of like qualifications" or "one hiring policy for women and another for men. . . ."[10] Rather, as *Aiello* teaches, since the Liberty plan provides equal benefits for all non-pregnant persons, whether male or female, it does not present any disparate treatment of similarly-situated persons or other form of sex discrimination.

B. It would, moreover, be "anomalous at best" for there to be dual definitions of discrimination—one for equal protection purposes and another for purposes of the Act. *Chance* v. *Board of Examiners,* 458 F. 2d 1167, 1176 (2nd Cir. 1972). Historically, it was only the conduct of the state that was circumscribed while a private employer had far broader leeway. The classical approach for a plaintiff was to demonstrate that there was state action in order to invoke the higher standard of conduct required by the equal protection clause. See, *e.g., Shelley* v. *Kramer,* 334 U. S. 1, 13 (1948). After the passage of the Act in 1964, the courts[11] interchangeably applied cases

9. See, *e.g., Reed* v. *Reed,* 404 U. S. 71 (1971); and *Frontiero* v. *Richardson,* 411 U. S. 677 (1973).

10. See *Espinoza* v. *Farah Manufacturing Co.,* 414 U. S. at 93, n. 6 (1973); cf. *Bond* v. *Virginia Polytechnic Institute,* 381 F. Supp. 1023, 1024-1025 (W. D. Va. 1974) (upholding the "underinclusiveness" of a student health plan's exclusion of coverage for gynecological examinations and pap tests); and *Fagan* v. *National Cash Register Co.,* 481 F.2d 1115 (D. C. Cir. 1973) (upholding an employer's requirement with respect to male employees' hair grooming).

11. See, *e.g., Davis* v. *Washington,* 512 F. 2d 956, 957-58 (D. C. Cir. 1975) ("The many decisions disposing of employment

involving Title VII and the equal protection clause, assuming that ". . . the test of validity under Title VII is not different from the test of validity under the fourteenth amendment."[12] And when in 1972 Congress extended the Act to cover public employment, "[t]here certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which previously existed" (*Morton* v. *Mancari*, 417 U. S. 535, 549 (1975)); the intent, instead, was to "provide" employees in the public sector with the same ". . . assistance of [an] agency of the Federal Government in redressing their grievances . . ."[13] The E. E. O. C. implicitly acknowledged this similarity of approach when, in its brief *amicus curiae* before the District Court in *Aiello*,[14] it noted that "the standards this Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII. . . ."

The illogical consequences of a definitional dichotomy also suggest the need for a common definition of discrimination. If, for example, the decision below is affirmed, the State of California, while free to exclude pregnancy when acting as an

discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII") and cases cited therein; and *United States* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973) and cases cited therein.

12. *United States* v. *Chesterfield County School District*, 484 F.2d at 73.

13. See S. Rep. No. 92-415, 92nd Cong. 1st Sess. (Oct. 28, 1971), pp. 10-11, 12-13; and H. Rep. No. 92-238, 92nd Cong. 1st Sess. (June 2, 1971), pp. 18-19, 22.

14. See also the EEOC's brief *amicus curiae* to this Court in *Aiello* (p. 2):

> The decision in this case will influence decisions in the cases under Title VII since, although the standards for determining unlawful discrimination are not precisely the same under Title VII and the Fourteenth Amendment, they are in many ways analogous.

insurer of employees in the State, would nevertheless be required to include pregnancy in the disability coverage of its own employees. Similarly, private employers in the State, who, with state certification in lieu of direct participation in the state plan, provide or purchase their own coverage broader than that offered by the State, would also presumably be able to do so only if pregnancy coverage was included. Conversely, if it is assumed that state approval would throw a protective cloak over such a private employer, the result would be equally anomalous. Private employers in certain states could exclude pregnancy from their covered risks, while in otherwise identical circumstances private employers elsewhere could not. There is, in short, neither a logical nor a historical reason for differentiating the instant case from *Aiello* on the basis of that case's constitutional context.

C. Relevant legislative history and administrative experience are further reason to find *Aiello* dispositive of this case. As the E. E. O. C. has conceded,[15] the Act's 1964 legislative history does not disclose a congressional intent to prohibit a pregnancy exclusion. The legislative history of the recently proposed Equal Rights Amendment to the Constitution also provides no support for the decision below; the resolution adopted by Congress recognized that "[e]quality does not mean sameness" and that the Amendment was not intended to "prohibit reasonable classifications based on characteristics that are unique to one sex . . . [as, *e.g.*,] a law providing for payment

15. Brief of the Commission to the Court of Appeals, p. 26, n. 17. The Court of Appeals similarly acknowledged that the ". . . legislative history pertaining to the addition of the word 'sex' to the Act is indeed meager. It appears that the amendment to the Act was offered in a tongue-in-cheek manner with the intent to undermine the entire Act and assist in its defeat. See 110 Cong. Rec. 2804-05 (1964)." Pet. App. p. A9. To the extent there is helpful legislative history, it reflects a desire to permit the practice of different benefits in "industrial plans" to continue. See 110 Cong. Rec. 13663-4 (remarks of Sen. Humphrey); 110 Cong. Rec. 2580 (remarks of Congresswoman St. George); and 110 Cong. Rec. 2582 (remarks of Congresswoman Kelly) (1964).

of the medical costs of child bearing [which] could only apply to women." S. Rep. No. 92-689, p. 12.[16] This expression of congressional intent, particularly in view of the absence of any illuminating history under Title VII, "is entitled to weight." *Glidden Company* v. *Zdanok,* 370 U. S. 530, 541 (1962).

The Court of Appeals noted that in 1972, when the Act was amended, "Congress had the chance to make any changes to the Act that it felt was necessary. No substantive changes were made regarding sex discrimination, and we feel this indicates a congressional satisfaction with the operation and administration of the Act." Pet. App. p. A9. The absence of any substantive change, however, militates against, rather than in favor of, the Court's interpretation of the Act. From the early 1960's through the 1972 amendments, multiple federal administrative agencies with the responsibility of preventing sex discrimination in employment uniformly approved the type of insurance plan here at issue. For example, under the Equal Pay Act (29 U. S. C. § 206(d)(1)), a law with a similar purpose as the sex discrimination provisions of the Act,[17] the standard of legality was, and continues to be, whether "employer contributions . . . are equal for both men and women"; in such a case, "no wage differential prohibited by the equal pay provisions will result from such payments even though the benefits which accrue to the employees in question are greater for one sex than for the

16. See also, to the same effect, the separate views of various Congressmen on H. J. Res. 208 (H. R. Rep. No. 92-359, 92nd Cong., 1st Sess. p. 7 (1971)), which were characterized by the majority report of the Senate Judiciary Committee as stating "concisely and accurately the understanding of the proponents of the Amendment. . . ." (S. Rep. No. 92-689, 92nd Cong., 1st Sess., p. 12 (1972); and the testimony of various proponents, including Congresswoman Griffiths (Hearings Before Subcommittee 4 of the House Comm. on the Judiciary 92nd Cong., 1st Sess. pp. 40, 51 (1971)), Congresswoman Abzug (*id.* at p. 116) and Congressman Ryan (117 Cong. Rec. H. 9368 (daily ed. Oct. 12, 1971)), all similarly indicating that the Amendment would not preclude laws dealing with a physical characteristic unique to one sex.

17. *Gilbert* v. *General Electric Company,* 126 Daily Lab. Rep. at D-4, n. 23.

other."[18] This same "equal contributions" test was and is followed by the Office of Federal Contract Compliance (hereafter "O. F. C. C.") under its authority to regulate sex discrimination on the part of federal contractors.[19] Even the E. E. O. C.'s contemporaneous construction of Title VII incorporated by reference the interpretations and opinions of the Wage and Hour Administrator,[20] and expressly permitted an "equal contributions" exclusion of pregnancy.[21] This harmonious approach did

18. Department of Labor Interpretative Bulletin, 29 C. F. R. § 800.116(d). See also the Wage and Hour Administrator's Opinion Letters No. 406 (Nov. 24, 1965), published at 2 CCH. Lab. L. Rep., Wages and Hours ¶ 30,996.34; and No. 1117 (Aug. 25, 1970), published at *id.* at ¶ 30,681.

19. See Executive Order 11246 (3 C. F. R. 339), as amended, and 42 U. S. C. § 2000e-3 for sources of the O. F. C. C.'s authority. 41 C. F. R. § 60-20.3(c) sets forth the pertinent regulation. Notwithstanding the new guidelines of the E. E. O. C. issued after the 1972 amendments to the Act (see pp. 24-26, *infra*), the O. F. C. C., with the same responsibility as the E. E. O. C., albeit over fewer employers, has continued to adhere to the Equal Pay Act standard. Proposed changes parallel to the new E. E. O. C. guidelines (see 38 Fed. Reg. 35336 (Dec. 27, 1973)) have *not* been adopted.

20. See 30 Fed. Reg. 14928 (December 2, 1965, § 1604.7(a) and (b)).

21. The E. E. O. C. in its *First Annual Report* (H. R. Doc. No. 86, 90th Cong., 1st Sess. (1966)) pp. 41-42, stated that an employer did not violate Title VII:

> . . . by contributing to or negotiating accident insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations, as long as the cost to the employer is the same for both groups of employees. Similarly, no violation occurs when male and female employees receive the same benefits, but the employer's contribution to the plan differs according to the sex of the employee.

See also E. E. O. C. General Counsel, Opinion Letter G. C. 158-65 (October 12, 1965), and G. C. 588-65 (January 28, 1966), cited in *E. E. O. C. First Annual Digest of Legal Interpretations* (1966), at pp. 22-23. With express reference to maternity benefits the E. E. O. C. consistently informed employers that they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury. Thus, in the *First Annual Report,* it was stated (pp. 40-41):

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes preg-

not result from happenstance. It was part of a design ". . . to assure that there [was] . . . uniformity of approach among Federal programs for equal opportunity"[22] as mandated by Section 703(h) of the Act (42 U. S. C. § 2000e-2(h)) which requires consistent application of the Equal Pay Act and Title VII. Indeed, when the 1972 amendments of the Act were enacted, the O. F. C. C.'s "equal contributions" standard was cited as evidence of the meritorious quality of its performance,[23] as was the Department of Labor's enforcement of the Equal Pay Act.[24]

nant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely.

See to the same effect: E. E. O. C. General Counsel Opinion Letters of November 15, 1966 (B. N. A. F. E. P. Rep. at 401:3032) and December 21, 1966 (C. C. H. Emp. Prac. Guide ¶ 17,304.43); and E. E. O. C. Dec. No. 70-360 of December 16, 1969 (C. C. H. Emp. Prac. Guide ¶ 6084).

22. Memorandum from John L. Wilks, Director of the O. F. C. C., dated November 12, 1970, to Heads of Agencies, prepared "[t]o assist Contract Compliance Officers in interpreting the Sex Discrimination Guidelines . . .", at p. 3:

> Q. What is a contractor's obligation with respect to fringe benefits?
>
> A. The contractor must provide equal money contributions or equal benefits for insurance, pensions, welfare programs and other similar fringe benefits received by men and women. This rule is consistent with the long established interpretation of the Equal Pay Act which the Department of Labor also administers. The Equal Pay Act is a 1963 Amendment to the Fair Labor Standards Act, requiring equal pay for women. See 29 C. F. R., Section 800-116(d). OFCC's interpretations are designed to assure that there will be a uniformity of approach among Federal programs for equal opportunity. See 41 CFR, Section 60-20.3(c).

23. See, *e.g.*, Leg. History of the Equal Employment Opportunity Act of 1972 (H. R. 1746, P. L. 92-261), Amending Title VII of the Civil Rights Act of 1964 (Gov't Printing Off., November 1972) (hereafter "Leg. History of 1972"), pp. 915-943, summarizing the achievements of the O. F. C. C. including its sex discrimination guidelines (p. 940) and affirmative action programs dealing with the problem of sex discrimination, and ultimately rejecting attempts to remove the O. F. C. C.'s jurisdiction over equal employment cases.

24. Leg. History of 1972, p. 1076.

At that time, in addition, various Federal agencies differentiated pregnancy under collective bargaining agreement health insurance policies notwithstanding that Executive Orders prohibiting sex discrimination had long been in effect.[25] The 1972 amendments, in sum, provide "no reason to presume that Congress affirmatively intended to erase [the "equal contributions" test for pregnancy] . . . that previously had co-existed with the broad discrimination provisions in the Executive Orders." *Morton* v. *Mancari*, 417 U. S. at 549.

As in *Aiello*, an insurance policy based, as here, on equal contributions and providing equal coverage for all persons is, on its face, non-discriminatory. To conclude otherwise under Title VII requires a clear expression of congressional intent. There is, however, as demonstrated above, no such expression of congressional intent in this case.

II. Respondents Failed to Show That the Exclusion of Pregnancy from Liberty's Disability Income Plan Was a Pretext Designed to Effect an Invidious Discrimination Against Females.

In this case, as in *Aiello*, there has been no showing that the exclusion of pregnancy from the disability income plan's list of compensable disabilities was not founded upon ". . . an objective and wholly noninvidious basis." 417 U. S. at 496. In contrast to potentially discriminatory situations,[26] the Respondents

25. See, *e.g.*, 1973 Nat'l Association of Letter Carriers Health Benefit Plan (U. S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance and Occupational Health, Form 41-51, Jan. 1973) at pp. 3, 10; and the 1973 American Fed'n of Gov't Employees Health Benefit Plan (U. S. Civil Serv. Comm'n, Bureau of Retirement Insurance and Occupational Health, Form 41-26 (Jan., 1973) at pp. 3, 8. In fact, apart from medical insurance, the E. E. O. C. itself placed special restriction on pregnancy leave through May 25, 1973. See U. S. E. E. O. C. Manual, Memorandum—"Advanced Sick Leave" (Dec. 20, 1972 and Jan. 26, 1973); U. S. E. E. O. C. Manual § 911(v) (Nov. 15, 1968 and July 25, 1969).

26. For example, an employer whose plan excluded sickle-cell anemia or Tay-Sachs, with concomitant inclusion of actuarially in-

did not, and could not, demonstrate that Liberty's pregnancy exclusion is based on pretextual considerations. To the contrary, pregnancy coverage is excluded because such coverage is "extraordinarily expensive" (*Aiello,* 417 U. S. at 493-494, and n. 18) due to its actuarially relevant dissimilarities from covered illnesses and injuries. Pregnancy thus has numerous characteristics in common with other excluded disabilities which, in many instances, are similarly concentrated in the members of a particular sex, race or religious group. See pp. 19-20 and nn. 33-38, *infra.* Inclusion of all these risks, which presumably would also be mandated by the decision below, would drastically alter the nature and function of present disability plans and distort the allocation of plan benefits.

The Liberty disability income plan has the same objective as the California plan in *Aiello:* ". . . to provide the broadest possible disability protection that would be affordable by all employees . . . ." *Id.* at 493. Since no benefit package can satisfy all the wants of all employees, risks which drain a disproportionate share of benefit dollars must be excluded to

distinguishable disorders, would have great difficulty rebutting a contention that these exclusions were designed to effect invidious discrimination. A disability income plan is likewise open to attack insofar as it may exclude abnormal complications encountered during pregnancy, *i.e.,* disabilities attributable to causes other than normal pregnancy and delivery, where those claims are not actuarially dissimilar from disabilities arising in non-pregnancy situations. In the instant case, although the Liberty plan does exclude "any cause related to pregnancy" (Appendix A p. 3; App. pp. 89, 99), that term has not been defined in the plan, the matter was never raised by the Respondents, and there is no record evidence, nor discussion by the trial court, of its implications. The abnormal complications question, therefore, is not before the Court in this case just as it was not at issue in *Aiello.* 417 U. S. at 491-492. It should be noted, however, that the Court of Appeals misconstrued the plan's coverage by assuming that the plan "would not cover a disability suffered by a pregnant woman but would have covered the disability had the woman not been pregnant." Pet. App. p. A8. In fact, the term "any cause related to pregnancy" is narrowly construed to encompass only those disabilities arising wholly and solely from pregnancy. All other disabilities incurred by pregnant women are covered.

enable the plan to provide a satisfactory level of benefits.[27] For Liberty, if pregnancy had been a covered risk, the number of claims under its plan would have increased 25 to 26%, necessarily requiring a contraction of the benefits available for other risks. App. p. 190. For American industry as a whole, one actuary estimated that, without such a contraction, adding pregnancy coverage to current disability income plans would cost an additional $1.35 billion annually. *Gilbert* v. *General Electric Co.,* 375 F. Supp. at 378. There are other similar figures: the 33 to 36% cost increase estimate by California in *Aiello* (417 U. S. at 494, n. 18); the 40 to 50% cost increase estimate by the Health Insurance Association of America and the American Life Insurance Association (Statement to O. F. C. C. pursuant to 38 Fed. Reg. 35336-35338 (1973)); the experiences encountered in providing pregnancy coverage under the New Jersey, Hawaii and Rhode Island disability state plans;[28] and the estimate on the part of American Telephone and Telegraph Company that, if pregnancy had been included under its policy, assuming an average maternity leave period of 5½

27. The California disability income program, as well as the General Electric plan in *Gilbert* v. *General Electric Co., supra,* include many risks excluded by the Liberty plan. Both plans provide, however, only 26 weeks of coverage and benefit maximums of $105 and $150 a week, respectively, whereas the Liberty plan provides, for an employee with only three months employment, two years of coverage and a benefit maximum of $150 a week, and, for an employee with five years or more service, a maximum of $275 per week until the employee attains the age of 65.

28. In New Jersey, where claims are limited to eight week duration, pregnancy claims accounted for between 49.09% and 57.51% of all benefits paid under that plan between 1969 and 1973. Coverage of pregnancy under the Hawaii disability plan resulted in an increase in female disability premiums from $4.00 a month to $8.76 a month. Reply Brief of Appellant in *Aiello,* pp. 17-18. Rhode Island initially included payments for pregnancy related work absences in its program but in 1946 placed limits thereon after it had incurred a deficit of $1.5 million between 1944 when the plan began and mid-1946. Brief of Appellant in *Aiello,* p. 11. Even thereafter, in 1949-1950, Rhode Island still paid out 30.4% of its total benefits for pregnancy related disabilities. Comment, 75 Col. L. Rev., *supra* n. 7, at 480, n. 202.

months, in 1970-1 and 1971-2 its costs would have increased by $32.7 and $39.5 million, respectively (Brief *amicus curiae* to the Court of Appeals, pp. 8-9). Due primarily to this prohibitive cost, pregnancy has been historically differentiated in disability income plans[29] and, in accord, is excluded from the Liberty plan. This is a legitimate consideration here as it was in *Aiello* and in other cases where this Court has upheld the validity of fiscal concerns "in the area of economics and social welfare." *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970); *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972).

Pregnancy also differs from covered illnesses and injuries in terms of its nature, severity, duration and frequency. "[P]regnancy is a normal biological process" (*Cohen* v. *Chesterfield County School Bd.*, 414 U. S. 632, 652 (Powell, J., concurring)); in contrast to covered illnesses, pregnancy is normally a desired occurrence that is planned, voluntary and not influenced by a motivation to recover. It occurs, as the District Court below noted, "with certainty and regularity" (Pet. App. p. A37) and is "neither a sickness nor a disability . . . in the usual sense of the word[s]." *Newmon* v. *Delta Airlines*, 374 F. Supp. 234, 245-6 (N.D. Ga. 1973).[30] It also generally results in an

29. Pregnancy coverage has been excluded, or severely restricted, in most disability income plans. See, *e.g.*, U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Sel. Health Insurance Plan under Collective Bargaining, Early 1966, Bull. No. 1502 (1966); and Koontz, *Child Birth and Child Rearing Leaves: Job Related Benefits*, 17 N. Y. L. F. 480, 491-492 (1972). "Such widespread use", as the Sixth Circuit recently observed, " 'is plainly worth considering' in determining the 'rationality' of . . . [employment] requirements." *Smith* v. *Troyan*, ... F. 2d ....., 143 Daily Lab. Rep. F-1, F-2 (July 24, 1975) (6th Cir. July 3, 1975), quoting *Manning* v. *Rose*, 507 F. 2d 889, 892 (6th Cir. 1974).

30. It is these statistical and quantitative differences, as well as the totally different cost involved, that distinguishes pregnancy from those "voluntary" disabilities, *e.g.*, certain forms of cosmetic surgery, covered by the Liberty plan. See Reply Brief of Appellant in *Aiello*, pp. 11-12 ("Truly voluntary cosmetic surgery represents a miniscule portion of the claims filed under the UIC, approximately 0.12% of all disability claims filed . . . . [O]f these claims, 85.5% were filed by women").

absence from employment which is substantially longer than any actual inability to work, and is significantly influenced by concern for the welfare of the child in addition to that of the mother.[31] Pregnancy further results, to a far greater extent than covered illnesses, in a decision to leave the work force.[32] Pregnancy, accordingly, has "unique characteristics" (*Aiello*, 417 U. S. at 496, n. 20) that are significantly dissimilar from the disabilities covered by the Liberty plan. These "characteristics peculiar to only one group rationally explain the [plan's different] . . . treatment of the two groups." *Johnson* v. *Robison*, 415 U. S. 361, 378 (1974).

The exclusion of pregnancy is predicated upon many of the same considerations—a substantial degree of personal volition, a frequency and duration rate which dwarfs covered conditions, the greater likelihood of non-return to work, and the resultant abnormal cost—that distinguish the plan's other exclusions. Those exclusions, moreover, may also be concentrated in a particular sex, race or religious group. For example, the exclusion of disabilities due to an act of war affects virtually only males; males in active military service outnumber females by in excess of 20 to 1 with the percentage in combat service presumably far greater.[33] The exclusion of attempted suicides

31. See Brief of Appellant in *Aiello*, p. 20.

32. As noted in Comment, 75 Col. L. Rev., *supra* n. 7, at 480-1:
"General Electric has estimated that 40 percent of its employees who take pregnancy leave do not return to their jobs afterward. American Telephone and Telegraph says it loses 48 percent of its employees after maternity leaves. Since part of the impetus behind an employer's provision of temporary disability benefits is to keep the recipient as a permanent member of his work force, payments made to women who leave their jobs permanently or semi-permanently, for whatever reason, following childbirth constitute in a sense a bonus to the woman and a loss to her employer (footnotes omitted)."

See also the Brief *amicus curiae* of American Telephone and Telegraph Company to the Court of Appeals, pp. 11-12; and the Brief of Appellant in *Aiello*, p. 21.

33. Department of Defense, Directorate of Manpower and Reserve Affairs, *Selected Manpower Statistics*, Tables P 26.0 and P 25.6 (1975).

and self-inflicted injuries also predominately affects males. There were, for example, in 1972 (the most recent year in which statistics are available), over twice as many male suicides as female.[34] Similarly, because there are approximately two male alcoholics for each female, if not a higher percentage,[35] as well as substantial differences among religious groups,[36] the effect of the plan's exclusion of disabilities due to alcoholism would also be concentrated in members of particular groups. The substantially disproportionate number of blacks who are reported narcotic addicts[37] and who are admitted to outpatient psychiatric services and public mental health institutions[38] would likewise presumably render susject the plan's exclusion of disabilities arising from mental or emotional disorders. Presumably, similar statistics may also be discovered with respect to the plan's exclusion of short-term disabilities and maximum payment periods. Cf. *Aiello*, 417 U. S. at 495 and n. 19.

For all the foregoing reasons, Liberty's exclusion of pregnancy cannot be presumed to be a "mere pretext designed to affect an invidious discrimination" against its female employees.

34. U. S. Bureau of the Census, *Statistical Abstract of the U. S.: 1974* (95th ed. 1974), p. 150.

35. National Clearinghouse for Alcohol Information, *Second Report to Congress*, p. 1 (1974); see also National Clearinghouse for Mental Health Information, "Primary Diagnosis of Discharges from General Hospital Psychiatric Inpatient Units" (hereafter "Primary Diagnosis"), Stat. Notes No. 68, 76 and 81 (1973)), indicating that, in terms of either "Disorders", "Disorders in Additions to Psychiatric Facilities" or "Characteristics of Residents of Alcoholism Halfway Houses", the ratio exceeds four males for each female.

36. See Snyder, *Alcohol and the Jews* (Yale Center of Alcohol Studies, 1958), p. 3.

37. See *Statistical Abstract of the U. S.: 1974, supra* n. 34, at p. 87.

38. Primary Diagnosis, *supra*, n. 33, Stat. Notes 41 and 79.

III. The Exclusion of Pregnancy from Liberty's Disability Income Plan Does Not Contravene Griggs v. Duke Power Co.

In *Griggs*, in order to effectuate the Act's objective of removing "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" (401 U. S. at 431), this Court proscribed job requirements which excluded disproportionate numbers of a protected group from job opportunities where such requirements could not be justified. The Court of Appeals found *Griggs* applicable to this case; that because Liberty's pregnancy exclusion ". . . treats a protected class in a disparate manner . . . [t]his is precisely what Title VII intends to strike down." Pet. App. p. A14. Even assuming *arguendo*, however, that a pregnancy exclusion in a disability income policy, in contrast, *e.g.*, to a maternity exclusion in a leave of absence policy,[39] can be termed a "barrier to employment," *Griggs* is inapposite. By excluding pregnancy coverage from its disability income plan, Liberty did not cause a disparity in benefits between its male and female employees. The pregnancy exclusion, moreover, is rationally related to the plan's objectives.

Respondents have never claimed, let alone established a requisite *prima facie* case, that the plan's pregnancy exclusion deprived Liberty female employees of a proportional share of benefits. Such a position would manifestly be untenable. Here, as in *Aiello*, "[t]he fiscal and actuarial

39. A maternity exclusion in a leave of absence policy necessarily results in a high risk of loss of employment or, even if a job is available upon the woman's return, a loss of seniority, benefits and promotional opportunities. Where, therefore, a leave of absence is granted for other similar reasons, and the maternity exclusion cannot be justified by business necessity, there is an artificial barrier to employment. Here, where the right of a female employee to take maternity leave is not now challenged, there has been no deprivation of employment opportunities.

benefits of the program accrue to [all] members of both sexes . . .," a pregnant woman receives ". . . insurance protection equivalent to that provided all other . . . employees." 417 U. S. at 497 and n. 20.[40] Moreover, as demonstrated in *Aiello* (417 U. S. at 497, n. 21), there is already a disproportionately greater claim rate and claim cost for females under disability plans. For example, one expert concluded that "the loss experiences of women, *even with pregnancy costs excluded,* may run two and a half times higher than costs for men."[41] The experiences of General Electric Company[42] and American Telephone and Telegraph Company[43] bear out these estimates. If pregnancy is covered, as the State of California observed in *Aiello,* the result would be the

> . . . creation of a new welfare program . . . 36% of all benefits will be devoted exclusively to benefits for normal pregnancy, and concentrated in the hands of the approximately 5% of female workers who are pregnant each year. Since normal pregnancy constitutes by far the largest single category of disability benefits, it would result in a truly dramatic benefit advantage for female workers.[44]

40. Many of the covered benefits, *e.g.,* hysterectomies, breast and uterine cancer and the removal of ovarian cysts, are disabilities limited to or primarily affecting females.

41. Herbert C. Dennenberg, former Commissioner of Insurance for the State of Pennsylvania, in testimony before the Joint Economic Committee of Congress on the "Economic Problems of Women", 93 Cong., 1st Sess., Report of Proceedings, Vol. 3 (1973), at p. 198 (emphasis added).

42. See *Gilbert* v. *General Electric Co.,* 375 F. Supp. at 378, where it was noted that female employees there received 170% more in benefits, with a pregnancy exclusion, than did male employees. With pregnancy covered, it was estimated that the differential would rise to 330%.

43. Brief *amicus curiae* to the Court of Appeals, p. 5:

> In 1970-71, women accounted for 64.65% of the total days for which benefits were paid, even though they were only 48.57% of the total work force eligible for benefits. Similarly, in 1971-1972, women received compensation for 63.45% of the total benefit days though representing only 48.29% of employees eligible for benefits.

44. Brief of Appellant in *Aiello,* pp. 35-6.

The Act, however, seeks only to insure equality of employment opportunity, not to provide a compensatory advantage for either men or women. *Griggs* ". . . lend[s] no support to [Respondents] . . . [because] the plain fact of the matter is that [the Liberty plan] does not discriminate against [women]." *Espinoza* v. *Farah Manufacturing Company,* 414 U. S. at 92-93.

Even where there are "variances in the . . . composition of the different . . . programs", if the variation "is *rationally related* to the purpose of the . . . programs . . . *Griggs* . . . is therefore inapposite." *Jefferson* v. *Hackney,* 406 U. S. 535, 549, n. 19 (1972) (emphasis supplied). Here, as shown above, Liberty's pregnancy exclusion was rationally related to its purpose of providing broad disability protection within affordable financial limits. To disregard such an objective would lead to bizarre results. An employer, for example, who provided disability protection against only cancer would presumably be immune from attack because, in contrast to the decision below, "nearly all disabilities [would not be] . . . covered" (Pet. App. p. A13); an employer, however, who covered many "temporary disabilities but excludes pregnancy" (*ibid.*), would if the decision below is affirmed, be in violation of the Act. Absent a demonstration of gender inequality with respect to plan contributions, aggregate risk coverage or actual distribution of benefits, however, there is no logical difference. Either both companies have complied with the intent of Title VII or both "had the purpose or effect of discriminating against [females]." *Espinoza* v. *Farah Manufacturing Company,* 414 U. S. at 92. To construe *Griggs* to find both plans unlawful would require that there must be "a greater economic benefit" provided whenever there are biological differences,[45] manifestly

45. Biological differences, *e.g.,* age, height, weight or the health history and life expectancy unique to each sex, provide objective actuarial criteria upon which all insurance is based. These distinctions prevent inequitable subsidies by one segment of an insured group for the benefit of another and permit all members to share the savings inherent in group coverage. They "are more a fact of life than an

necessitating more than "one exception to the cost of differential defense."[46] *Griggs*, it is submitted, does not require such preferential treatment.

IV. The E. E. O. C.'s Current Guidelines Do Not Merit Deference.

The Court of Appeals placed substantial reliance on the E. E. O. C.'s current guidelines, 29 C. F. R. §§ 1604.9 and 1604.10 (Pet. App. pp. A9-A12 and n. 5). Even assuming the guidelines are applicable,[47] any deference thereto was misplaced.

invidious discrimination." Comment, *Developments—Title VII*, 84 Harv. L. Rev. 1109, 1174-5 (1971). Cf. *Smith* v. *Troyan, supra* (upholding height requirement for police officers notwithstanding disparate impact on females); and *Reynolds* v. *McNichols*, 488 F.2d 1378, 1383 (10th Cir. 1973) (upholding city "hold and treat" ordinance for prostitutes).

Benefit variations predicated on such biological differences were, as already noted, originally approved by the E. E. O. C. and still are approved by the Wage and Hour Administrator and the O. F. C. C. See pp. 12-14 and nn. 18-22. Similarly, the Department of Labor permits benefit variations based on age differences. See 29 C. F. R. 860.120. And, at the state level, the California Fair Employment Practices Act provides:

> Nothing contained in this part relating to discrimination on account of sex shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices. Calif. Lab. Code, Part 4.5 § 1432.

Similarly, Section XI of the sex discrimination guideline of the Illinois Fair Employment Practices Commission provides that

> . . . differences in contributions, benefits or other provisions in [fringe benefit insurance] plans which are adopted in good faith based on sound actuarial data may not be deemed to violate the Act.

46. Cf. Brief of the E. E. O. C. as *amicus curiae* to the Court of Appeals pp. 23-4, quoting *Gilbert* v. *General Electric Company*, 375 F. Supp. at 383.

47. The guidelines provide that a "disability due to pregnancy or childbirth . . ." shall be treated "on the same terms and conditions as . . . *other temporary disabilities.*" (emphasis added). The guidelines provide, however, no standards to adjudicate a policy which excludes some temporary disabilities other than pregnancy. The guidelines thus do not pertain to a situation, as in this case, where the employer does not have a separate "temporary disability" policy but has a permanent disability policy which, by sacrificing protection against some short term disabilities, provides quality long-term protection.

First, the guidelines do not represent the contemporaneous construction of a statute. They have not ". . . been acted on for a number of years . . ." (*Udall* v. *Tallman*, 380 U. S. 1, 18 (1965)) nor do they have ". . . that consistency to which [this Court] should yield [its] judgment." *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 154 F. 2d 785, 789, *aff'd*, 328 U. S. 275 (1946). Rather, as already shown, there is no legislative history supporting the Commission's view;[48] the present guidelines were adopted eight years after the Act was passed; and, like the E. E. O. C. guidelines in *Espinoza*, ". . . the Commission itself once held a different view. . . ." 414 U. S. at 94. See also *United Housing Foundation* v. *Forman*, ... U. S. ....., 95 S. Ct. 2051 at n. 24 (1975).

Second, the E. E. O. C.'s dramatic reversal of its prior position was not accompanied by ". . . the thoroughness evident in its consideration . . . [and] the validity of its reasoning . . . which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). There were no public hearings or comments, no intervening statutory developments or no compelling studies to warrant a deviation from the

48. The will of Congress, as reflected by the 1972 amendments to the Act, was, if expressed at all, to continue the Commission's then-existing policy of sanctioning a pregnancy exclusion. See pp. 11-15, *supra*. As the Fifth Circuit *en banc* recently observed, in view of the "inconclusive" legislative history and "insufficiently developed" state of law, "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate." *Willingham* v. *Macon Tel. Publishing Co.*, 507 F. 2d 1084, 1090 (5th Cir. 1975). "[A]pplication of the guidelines . . ." here, as in *Espinoza* (414 U. S. at 94), would thus ". . . be inconsistent with an obvious congressional intent not to reach the employment practice in question."

Commission's previously well-established position that a pregnancy exclusion from an income protection plan was not discriminatory. To the contrary, the E. E. O. C. ". . . conducted no medical studies . . . [or] financial studies"; the responsible personnel "had no expertise in medicine, economics, or labor relations . . . [or] empirical data upon which to base the new guidelines."[49] There was, in sum, ". . . no factual basis upon which these regulations were drawn." *Newmon* v. *Delta Air Lines*, 374 F. Supp. at 245.

Finally, for all of the reasons discussed in the preceding sections of this brief, here, as in *Espinoza*, "Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong'." 414 U. S. at 94-95. There is in the instant case the compelling absence of any ". . . good reason to treat the guidelines as expressing the will of Congress." *Griggs*, 401 U. S. at 434.

49. Comment, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted*, 24 DePaul L. Rev. 127, 130-131 (1974), which also argues, as the Fourth Circuit noted but found "beside the point" in *Gilbert* v. *General Electric Co.* (126 Daily Lab. Rep. at D-2, n. 12), that the guidelines were improperly issued and are invalid by virtue of the Administrative Procedure Act, 5 U. S. C. § 553, and the limitations placed on the Commission's rule-making authority by Section 731(a) of the Act.

CONCLUSION

For all the foregoing reasons, it is respectfully prayed that the judgment of the Court of Appeals be reversed insofar as it affirmed the District Court's grant of summary judgment and found that Liberty's disability income protection plan is violative of the Act.

Respectfully submitted,

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APPENDIX A

Excerpts from Liberty Mutual Insurance Company's Current Employee Group Benefit Handbook

OUR
GROUP
BENEFIT PLANS

APPENDIX A

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A2

INCOME PROTECTION

When disability from illness or accident keeps you away from work, your Income Protection plan is designed to continue a portion of your usual earnings.

INSURANCE BENEFITS begin with the eighth day of disability. Employees with more than three months but less than five years of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $150.00 per week, for 103 weeks.

Employees with five years or more of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $275.00 per week to the first of the month in which the employee attains age 65. These benefits are payable during the first year of disability if you are unable to perform the duties of your occupation. Benefits are payable beyond the first year of disability only if you are unable to perform the duties of any occupation.

Benefits payable for any week of disability will be reduced by amounts payable under workmen's compensation and similar laws, social security laws (primary and dependent benefits) and other statutes, any retirement plan, any group insurance plan except a group policy held by Liberty Mutual, and any remuneration earned during such week.

Benefits are payable for each period of disability. Successive periods due to the same or related causes will be considered one period of disability.

Limitations On Insurance Benefits:

Benefits are not payable for disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures.

No benefits will be paid beyond the first of the month in which the employee attains age 65.

No benefit is payable for any portion of a period of disability due to mental or emotional disorder, alcoholism, or drug addiction unless the employee is engaged in a corrective program under the guidance of a licensed physician.

If you are absent from work for any reason, other than vacation or paid excused absence, on the date the insurance or an increase in the duration and amount of benefits would otherwise become effective, the insurance, or the increase, will not be effective until your return to work on a full-time basis.

SUPPLEMENTARY SALARY BENEFITS are provided by the Company to help fill the gap between insurance benefits and your usual earnings.

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In cases covered by insurance under the Income Protection Plan, Liberty Mutual pays your full salary for the first week of disability. Then, for as many weeks as you have completed years of service with the Company, it pays one-half the difference between full salary and the insurance benefits.

YOUR COST for the Income Protection Insurance benefits is 33 cents for each $100 of salary. (This is less than one-third of the cost; Liberty Mutual pays the balance for you.) For example:

At Weekly Salary of	Bi-Weekly Salary of	Bi-Weekly Cost (Payroll Deduction)
$ 80.	$160.	$ .53
100.	200.	.66
150.	300.	.99
225.	450.	1.49 (max.)

These rates apply in all states except those where compulsory laws necessitate slight variations. The rates are based on present insurance costs and are subject to change if insurance costs change.

Income Protection Insurance is taken by all full time employees as a condition of employment.

SPECIAL STATUTORY DISABILITY BENEFITS apply in California, Hawaii, New Jersey, New York, Puerto Rico and Rhode Island. Employees in most of these places will be covered for the statutory benefits from the first day of employment. You still become eligible for the Income Protection plan after completing three months of continuous full-time employment.

If you are employed in one of these areas and disability occurs after you are insured for Income Protection, you will receive under the Income Protection plan the difference between the amount paid by statutory accident and sickness insurance and the benefit you would ordinarily receive from the Income Protection plan.

* * * *